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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

GERALD L. WIEBE,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June, 1984

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GERALD L. WIEBE,
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v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

QUESTION PRESENTED

When a Grand Jury indictment only alleges "total" assets and liabilities were false on a single financial statement where 41 entries were included in the "total," does it violate a Defendant's Fifth Amendment guaranty to be indicted and convicted only on the basis of facts found by the Grand Jury when the prosecutor is permitted, over objection, to select which of the 41 entries the prosecutor believes the Grand Jury intended as making the "total" false (especially where, as here, two different prosecutors selected different entries)?

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CONSTITUTIONS, STATUTES AND REGULATIONS

United States Constitution
Fifth Amendment 1,2, 4,6,8

18 U.S.C. §1014 1

OPINIONS BELOW

The opinions of the Court of Appeals regarding Petitioner's Appeal and subsequent Petition for Rehearing, which were not published, appear in Appendix A hereto. No written opinions were rendered by the United States District Court for the District of Colorado.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 2, 1984. The Order denying the Wiebe Petition for Rehearing was entered on May 4, 1984. The Wiebe Motion for Stay of the Mandate was granted until June 11, 1984. This petition for certiorari was filed by that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution which states in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger . . . .

STATEMENT OF THE CASE

Gerald L. Wiebe was convicted on 5/17/83 on two counts of violating 18 U.S.C. §1014, knowingly making a false statement and wilfully overvaluing property for the purpose of influencing a federally insured bank. Wiebe was sentenced to the maximum possible sentence of two consecutive two year terms.

Both counts were based, in part, on the same personal financial statement which contained **41** different entries. However, the indictment, insofar as here pertinent, merely states:

> Wiebe, did knowingly make a false statement... upon a loan application by submitting a personal financial statement which he knew to be false and fraudulent in that **total assets were overstated, total liabilities were understated**....

The Court of Appeals affirmed the conviction by focusing on only three of the four issues raised on appeal:

1. **Notice** requirement of the Fifth Amendment — the indictment must give notice to Wiebe of the charges against him;
2. Pre-indictment delay;
3. Erroneous Denial of Request for Bill of Particulars.

However, the Court of Appeals ignored the exceptional constitutional question raised by Wiebe before and after trial which was first recognized by this Court in **Russell v. United States,** 369 U.S. 749 (1962); whether an indictment that fails to state the bases upon which the Grand Jury returned the indictment makes possible subsequent amendments of the indictment by the prosecutor in direct violation of the defendant's Fifth Amendment guaranty to be tried only on grounds returned by the Grand Jury.

The Tenth Circuit focused solely on the **notice** issue, not the **Grand Jury right.** The constitutional right to be indicted on the basis of specific facts found by the Grand Jury is separate and apart from the constitutional right to notice and an opportunity

to be heard and defend — although both arise from the Fifth Amendment. Only the former is raised again in this Petition for Certiorari.

FACTS HERE PERTINENT

The crux here is what did the Grand Jury decide, and were three different Assistant United States Attorneys allowed to change the decision of the Grand Jury.

The Grand Jury heard evidence from only one witness, FBI Agent Robinson. AUSA John Martin presented the evidence. Regarding the Wiebe balance sheet containing 41 different entries, Agent Robinson testified about the following specific items:

Assets

1) Value of the **patents** worthless, not $1.5 million (Grand Jury Transcript at 5);

Liabilities

2) $110,000 Iowa judgment against Wiebe (G.J. at 5);

3) $925,000 promissory note for Arkansas resort (G.J. at 5);

4) $1.38 million debt - Boatman's Bank (G.J. at 6);

5) $500,000 debt to Production Credit Association (G.J. at 6);

6) $50,000 loan - Peoples Bank (G.J. at 6);

7) $100,000 loan - Small Business Administration (G.J. at 6);

8) $150,000 IRS tax lien (G.J. at 6);

9) Undeclared bankruptcies (G.J. at 6).

The indictment returned by the Grand Jury, similar to a general verdict of a Trial Jury, focused only on **total** assets and **total** liabilities.

Consequently, at the pre-trial hearing, the second prosecutor, AUSA Austin was, over objection, given the freedom by the Trial Court to decide which specific entry or entries she thought the Grand Jury intended as the one or more making the "total" false. (4/14/83 Pre-trial Hearing at 9-12). AUSA Austin decided the Grand Jury intended:

Assets

1) Overvaluation of **stocks**, not patents. (Unlike the patents, the value of the **stocks** was **not** discussed by Agent Robinson);

Liabilities

2) $110,000 Iowa judgment;

3) $925,000 promissory note for Arkansas resort;

4) $1.38 million debt - Boatman's Bank;

5) $500,000 debt - Production Credit Association;

6) Undeclared bankruptcies.

Even though the Grand Jury had heard Agent Robinson testify to Wiebe's valuation of his patents, the S.B.A. loan and the I.R.S. tax lien, above, AUSA Austin decided to OMIT those specific items as the basis for the Grand Jury conclusion the "total" was allegedly false.

Even more egregious was the decision by AUSA Austin to focus on Wiebe's valuation of his **stocks**, an entry **never** discussed by Agent Robinson and therefore, **never** returned by the Grand Jury.

At trial, the third prosecutor, AUSA Stephens, was, over objection, also given the freedom to select which of the one or more of the 41 entries the Grand Jury must have relied upon in deciding the "total" was false. AUSA Stephens decided the specific items were:

1) Iowa judgment;

2) Arkansas resort;

3) Boatman's Bank;

4) Production Credit Association;

5) Bankruptcies.

In so doing, AUSA Stephens decided that the value of the patents, the SBA loan and the IRS tax lien must **not** have been relied upon by the Grand Jury in reaching their decision that the total was false.

ARGUMENT

THE WIEBE INDICTMENT VIOLATES HIS CONSTITUTIONAL RIGHT TO BE INDICTED AND CONVICTED ONLY ON THE BASIS OF SPECIFIC FACTS HEARD AND FOUND BY THE GRAND JURY.

The Fifth Amendment clearly mandates that a defendant is not to be tried based on grounds deemed sufficient by the courts or the government, but rather is to be tried only on grounds returned by a panel of his fellow citizens. It is fundamental to our criminal justice system that when an indictment is the source of the criminal charge, the Grand Jury be the **sole body** responsible for determining the specific facts upon which criminal charges are brought against an individual. Otherwise, every citizen would be exposed to the risk of

unfounded accusations and tyranny by the government. **Ex Parte Bain,** 121 U.S. 1, 11 (1886).

The indictment is the instrument which evidences the intent and will of the Grand Jury. It assures that the defendant cannot be later tried on grounds proffered only by the government. For Fifth Amendment purposes, the indictment itself, as the voice of the Grand Jury, must serve as the check on the prosecutor. An indictment which fails to articulate the specific items upon which the charges are returned fails to offer a check on the government's conduct at motion hearings as well as at trial.

The indictment which is the subject of this appeal, stated in pertinent part:

> Wiebe, did knowingly make a false statement . . . upon a loan application by submitting a personal financial statement which he knew to be false and fraudulent in that **total assets were overstated, total liabilities were understated** . . . .

This indictment is insufficient in that it failed to enumerate which of the total 41 entries on the financial statement were considered false by the Grand Jury. This indictment failed to act as a check on the prosecutor! Here, the United States Attorney was given the freedom to make a decision at the pre-trial hearing as to which one or more of the 41 entries the prosecutor thought the Grand Jury intended. Later, another prosecutor was allowed to make a second selection and introduce proof at trial as to which one or more of the 41 entries he thought the Grand Jury intended.

For example, at the 4/14/83 hearing, AUSA Austin was freely permitted by the Trial Court to pick and choose the specific entries upon which she wished to prosecute Wiebe (4/14 H. at 9-12). Since the

indictment merely referred to overstatement and understatement of assets and liabilities, she was free to select the entries **she** (not the Grand Jury) felt were significant. AUSA Austin presented the Trial Court with a balance sheet with circles on it, indicating the items she would **not** introduce proof on at trial. (4/14/83 Pre-trial Hearing at 9-12).

Wiebe maintains that it was **not** the prosecutor's prerogative to select the entries she would or would not present at trial. It is the decision of the **Grand Jury** which controls on which entries the Defendant is to be prosecuted.

Here, the record indicates that the grounds presented at trial did **not** mirror the grounds before the Grand Jury. FBI agent Robinson was the only Government witness before the Grand Jury. During his testimony, he described certain assets and liabilities which allegedly had not been properly recorded by Wiebe on the financial statement. Robinson testified **inter alia** that Wiebe had overvalued his patents on the assets side (Grand Jury transcript at 5) and deleted a $100,000 loan from the Small Business Administration on the liability side of the balance sheet (Grand Jury transcript at 6). Additionally, Robinson testified that Wiebe had not disclosed a $150,000 IRS tax lien (Grand Jury transcript at 6).

However, at trial, AUSA Stephens chose not to introduce proof at trial regarding the above entries. In so doing, the prosecutor was second guessing the specific items considered sufficient by the Grand Jury.

In **Russell v. United States**, 369 U.S. 749 (1962), this Court stated:

> To allow the prosecutor, or the court, to make a **subsequent guess** as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be **convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.**

Id. at 770 (emphasis added).

If the prosecutor is allowed to select the grounds on which the defendant should be prosecuted, the defendant is tried on grounds not selected by the Grand Jury. Here it is possible the Grand Jury based its decision on one or more of the three items testified to by Robinson but later omitted by the prosecutor. For instance, the testimony about the patents entry could have been particularly significant to the Grand Jury since the discrepancy between Wiebe's valuation ($1.5 million) and Robinson's ($0) was so great.

Yet, AUSA Austin, and later AUSA Stephens, were allowed to omit these three items from the count in the indictment, and thus prosecute Wiebe on grounds **not** returned by the Grand Jury; a clear violation of Wiebe's Fifth Amendment rights!

In **United States v. Radetsky**, 535 F.2d 556 (10th Cir. 1976), **cert. denied**, 429 U.S. 820 (1976), the only case researched to date which deals with the Fifth Amendment guaranty and documents containing multiple entries, the court acknowledged the peculiar dilemma posed in formulating such indictments. Dr. Radetsky claimed that he was unsure which entries on each payment request form submitted by

him to Medicare were considered false by the Grand Jury. Radetsky claimed that he was unable to ensure that he was only tried on items selected by the Grand Jury.

The **Radetsky** court recognized the merit in Radetsky's position but concluded that the particular details alleged in the indictment were sufficiently definite to act as a check on the government. **Id.** at 564-565.

In contrast, Wiebe's indictment did **not** sufficiently identify the entries in question. Whereas the Radetsky indictment identified the nature and extent of each type of concealment and falsification, the Wiebe indictment was silent as to which specific items among 41 alternatives the Grand Jury determined were sufficient to support indictment.

In **Radetsky**, each count of the indictment dealt with a particular fraudulent payment request submitted by the defendant to Medicare for services allegedly performed. Each payment request at issue was specifically identified in the indictment by the date of the doctor's claim, the time covered by the claim, the name of the patient and the material facts which made the request false.

By focusing on the material facts alleged in the **Radetsky** indictment, it becomes clear that the **Wiebe** indictment offends the Fifth Amendment guaranty.

Specifically, in **Radetsky**, the defendant was informed by the indictment which of **four** different types of fraud he had committed in connection with each payment request form he submitted to Medicare.

First, as to each payment request, the indictment stated whether Radetsky had submitted request forms to Medicare for patient visits that never occurred. The indictment **specifically identified** the dates Dr. Radetsky falsely alleged he saw patients.

Second, as to each payment request, the indictment stated whether Radetsky had falsely claimed to have performed **services covered** by Medicare when in reality he had performed services **not covered** by Medicare and were thus, **not reimbursable.**

By "services," it was clear from the evidence before the Grand Jury and the bill of particulars, that Radetsky was making false claims regarding **drugs** he administered. While the patient's record would show that Radetsky administered B-12, a vitamin not covered by Medicare, the payment request would reflect instead that Mercuhydrin was administered; a drug that was covered by Medicare.

Third, each payment request would reflect whether Radetsky had lied to Medicare regarding the amount he charged his patients. This was reflected on the indictment by the word "**charges.**" Since Medicare would only pay 80% of a doctor's bill, Radetsky would inflate his charges from the actual $8 fee to a $10 fee so that he would get 80% of $10, or $8 -- in effect 100% of his full fee from Medicare. The indictment, ¶F, expressly said that in all counts accusing inflation, the amount was $1 or $2 per service. Thus, from the indictment, Radetsky knew the precise extent of the overcharges the Grand Jury found were attributed to him.

Finally, each payment request also reflected whether Radetsky was inflating his charges when submitting claim forms on behalf of a patient who

had already paid him. This was reflected on the indictment by the words "**amount paid.**" (Thus, if the patient had paid him $8, Radetsky would lie and tell Medicare the patient had paid $10. Consequently, Medicare would reimburse Radetsky 80% of $10 or $8 -- again 100% of the actual charge. In short, Radetsky would receive $8 from the patient and $8 from Medicare).

Thus, from the **face** of the **Radetsky** indictment, the defendant was able to exactly identify the type of fraud and on which of the multiple entries the Grand Jury concluded it occurred. Furthermore, since each count identified the particular fraud involved among the multiple entries on the single payment request, the prosecutor was limited to the exact false items the Grand Jury addressed on each payment request.

In **Radetsky**, the Tenth Circuit in a split decision barely upheld the indictment. Yet, **Radetsky** is a much more specific indictment than Wiebe. Here, since the indictment did **not** specify the entries before the Grand Jury, AUSA Austin and AUSA Stephens were free at the 4/14/83 hearing, and again at trial, to pick and choose the grounds upon which Wiebe would be prosecuted. Here, unlike **Radetsky**, Wiebe could not ascertain which specific items on the balance sheet were found to be false by the Grand Jury.

Public policy mandates that the government not be permitted to obliquely word an indictment regarding a single document containing multiple entries such that the indictment will no longer serve as a check on the prosecutor.

It is essential that this Court articulate standards for the government on drafting such indictments.

Cases like Wiebe's will arise again and again; whether they involve financial statements, Medicare fraud (Radetsky) or even tax return fraud. All the government had to do to preserve Wiebe's Fifth Amendment rights was to specifically identify the alleged false entries when drafting and presenting the indictment to the Grand Jury.

When balancing Wiebe's Fifth Amendment right against this minor inconvenience to the government, clearly the **constitutional right** should prevail over **administrative convenience.**

CONCLUSION

It is therefore respectfully submitted that the Petition for Certiorari should be granted.

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GERALD L. WIEBE, Defendant-Appellant.	)	No. 83-1978 (D. C. 82-CR-212) (D. Colo.)

ORDER AND JUDGMENT

Before SETH, Chief Judge, BARRETT, Circuit Judge, and SAFFELS, District Judge*.

The defendant was indicted under 18 U.S.C. § 1014 on two counts, was tried, convicted and sentenced. The statements upon which the charges were based consisted of the loan application forms, a balance sheet and two income tax returns presented on separate occasions to two Colorado banks to secure loans. The elements of the charges were established. The defendant appeals on the ground that the indictment should have been dismissed for vagueness, for a denial of a bill of particulars and for preindictment delay.

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*Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

The defendant at trial and on appeal argues that the indictment is vague, is in general terms and does not specify the particular entries in the two financial statements (balance sheets) which were false. Each financial statement had 40-45 entries. It was in simple form and of very limited scope. It was alleged that the liabilities were understated and the assets overstated in each statement. The defendant is a college graduate with some 25 years of business experience.

The indictment also alleged that the defendant represented to the bank that the balance sheets were prepared by a particular certified public accountant when in fact they were not. The defendant also submitted to the banks what he represented to be copies of his income tax returns for the years 1977 and 1978 but in fact they were not copies of such returns as such returns were not filed until 1981 and were much different from those submitted to the banks.

In response to defendant's motion for a bill of particulars the prosecution marked the figures on the balance sheets which it was not going to challenge. It also advised the defendant at the hearing on the motion as to what liabilities the Government was going to prove should have been included in the balance sheet, the assets overvalued, and that it was going to center on the omission or understatement of liabilities in the amount of about two million dollars. On this basis the trial court examined the balance sheet, heard arguments, and heard the prosecution state what it expected to prove. The court then denied the motion for a bill of particulars. The defendant by the indictment, by the markings on the balance sheet and the statements at the hearing on April 14 (about a month

before trial) was advised as to all the details of the charge. There was no need for a bill of particulars. The indictment was adequate under **United States v. Whitman,** 665 F.2d 313 (10th Cir.), **United States v. Tokoph,** 514 F.2d 597 (10th Cir.), and **United States v. Kramer,** 500 F.2d 1185 (10th Cir.). The defendant urges that the application of **United States v. Radetsky,** 535 F.2d 556 (10th Cir.), would lead to a different result as to the specific details which should be alleged. **Radetsky** really mandates the conclusion that this indictment is sufficient. The defendant relies on **United States v. Curtis,** 506 F.2d 985 (10th Cir.); however, the failure there was in the description of the fraud or scheme relied on.

We have examined the facts and the arguments as to preindictment delay, but find nothing in the circumstances to indicate that the delay was caused by anything other than the defendant's repeated failure to produce the records of several enterprises the grand jury was considering, and by the ordinary preparation of the case. **See United States v. Lovasco,** 431 U.S. 783, **United States v. Marion,** 404 U.S. 307, and **United States v. Comosona,** 614 F.2d 695 (10th Cir.).

We have considered the other contentions of defendant and find them to be without merit.

AFFIRMED.

HOWARD K. PHILLIPS
Clerk

MARCH TERM - May 4, 1984

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Dale E. Saffels*

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 83-1978
GERALD L. WIEBE,	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc in the captioned appeal.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS
Clerk

*of the United States District Court for the District of Kansas, sitting by designation.

APPENDIX A